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## The Hague Principles, the CISG, and the “Battle Of Forms”

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## THE HAGUE PRINCIPLES, THE CISG, AND THE “BATTLE OF FORMS”

*Peter Winship\**

The Hague Conference on Private International Law is about to adopt Principles on Choice of Law in International Commercial Contracts (Principles).<sup>1</sup> Assume an enterprise in Texas agrees to provide commercial services to an enterprise in Peru, and the parties agree that the law of Texas applies to any dispute arising from their contract. Will a court enforce this choice-of-law agreement? Courts in most States will do so. For these States the Principles provide a codification of basic rules together with some refinements. Some States, however, do not enforce such agreements or restrict their enforceability. The Principles and the accompanying Commentary seek to persuade these latter States that recognizing party autonomy as to the choice of law is preferable. As the Introduction to the Principles states, “[p]arty autonomy . . . enhances certainty and predictability . . .

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<sup>1</sup> The Hague Conference on Private International Law published a revised draft in July 2014. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, THE DRAFT HAGUE PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS, Prel. Doc. No. 6 (revised) (July 2014) [hereinafter *Hague Principles* or *Principles*], *available at* [http://www.hcch.net/upload/wop/gap2014pd06rev\\_en.pdf](http://www.hcch.net/upload/wop/gap2014pd06rev_en.pdf). Member States of the Hague Conference had until August 31, 2014 to submit comments on recent amendments to the text of the Commentary. COUNCIL ON GENERAL AFFAIRS AND POLICY OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, CONCLUSIONS AND RECOMMENDATIONS ADOPTED BY THE COUNCIL, ¶ 2 (April 2014), *available at* [http://www.hcch.net/upload/wop/genaff2014concl\\_en.pdf](http://www.hcch.net/upload/wop/genaff2014concl_en.pdf). In the light of these comments, the Conference’s Working Group will prepare a definitive final text, which the Conference will then circulate to Member States. If there are no objections within sixty days the draft will be an official text of the Hague Conference. *Id.* [Ed. The Principles entered into force on March 19, 2015. The final text may be found at <http://www.hcch.net/upload/conventions/txt40en.pdf>].

and recognises that parties to a contract may be in the best position to determine which set of legal principles is most suitable for their transaction.”<sup>2</sup>

The Hague Principles are no stranger to the International Academy of Commercial and Consumer Law. At the Academy’s July 2012 meeting in Mexico City, Neil Cohen, a participant in the Working Group drafting the Principles, traced the history of the project and identified the principal issues addressed by the Hague draft.<sup>3</sup> Since his report the number of commentaries analyzing the Principles has grown.<sup>4</sup> Most of this literature comments on the Principles as a whole. This paper, however, is more limited in scope. It considers only one issue: the relation of the Hague Principles to the United Nations Convention on Contracts for the International Sale of Goods (CISG)<sup>5</sup> when parties to an international contract of sales refer during negotiations to their standard terms and these standard terms include choice-of-law terms that conflict.

Paragraph 1 *b*) of Article 6 of the Principles purports to answer whether parties to an international commercial contract—including an international contract of sale—have agreed on a choice of law when they make such references without resolving differences in their standard terms. Article 6 as a whole provides:

Hague Principles

Article 6 (Agreement on choice of law and battle of forms)

Paragraph 1

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<sup>2</sup> Hague Principles, *supra* note 1, at ¶ I.3.

<sup>3</sup> Neil B. Cohen, *The Proposed Hague Principles on Choice of Law in International Commercial Contracts*, in *THE EVOLUTION OF THE GLOBAL TRADE OVER THE LAST THIRTY YEARS 157-71* (Elvia Arcelia Quintana Adriano, ed., 2014).

<sup>4</sup> See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, HAGUE DRAFT PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL CONTRACTS: BIBLIOGRAPHY, *available at* [http://www.hcch.net/upload/draft\\_principles\\_bibl-e.pdf](http://www.hcch.net/upload/draft_principles_bibl-e.pdf).

<sup>5</sup> Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 [hereinafter CISG].

Subject to paragraph 2 -

whether the parties have agreed to a choice of law is determined by the law that was purportedly agreed to;

if the parties have used standard terms designating two different laws and under both of these laws the same standard terms prevail, the law designated in the prevailing terms applies; if under these laws different standard terms prevail, or if under one or both of these laws no standard terms prevail, there is no choice of law.

#### Paragraph 2

The law of the State in which a party has its establishment determines whether that party has consented to the choice of law if, under the circumstances, it would not be reasonable to make that determination under the law specified in paragraph 1.<sup>6</sup>

The solution in paragraph 1 *b*) draws heavily on the thoughtful analysis of Thomas Kadner Graziano, a Swiss member of the Working Group.<sup>7</sup> In his preliminary analysis of the Hague Principles, Symeon Symeonides rightfully pays tribute to Professor Kadner's contribution to resolving this "difficult problem"<sup>8</sup>—a problem acknowledged to be one of the more challenging problems in private international law.<sup>9</sup> Because of its novelty, the solution in Article 6 will no doubt attract considerable attention from scholars and possibly judges and arbitrators. To assist the reader, the Commentary to Article 6 analyzes four scenarios, the fourth of which purports to apply the Principle to a contract of sale governed by the CISG.

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<sup>6</sup> Hague Principles, *supra* note 1, at art. 6.

<sup>7</sup> Thomas Kadner Graziano, *Solving the Riddle of Conflicting Choice of Law Clauses in Battle of Forms Situations: The Hague Solution*, 14 Y.B. PRIV. INT'L L. 71 (2013).

<sup>8</sup> Symeon C. Symeonides, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments*, 61 AM. J. COMP. L. 873, 877 (2013).

<sup>9</sup> See generally Gerhard Dannemann, *The "Battle of the Forms" and the Conflict of Laws*, in LEX MERCATORIA: ESSAYS ON INTERNATIONAL COMMERCIAL LAW IN HONOUR OF FRANCIS REYNOLDS 199 (F.D. Rose ed., 2000).

This paper considers only this last scenario: the relation of the Hague Principles to the CISG when a seller and a buyer fail to resolve differences in their choice-of-law standard terms. I leave to separate papers the analysis of Article 6 and an evaluation of the Principles as a whole. The thesis of this paper is that the solution offered in the Commentary is not the only reasonable way to analyze the scenario.

## I. PRELIMINARY REMARKS

### A. The “Battle of Forms”

The “battle of forms” is to academic lawyers what a candle is to moths. Most of my acquaintances have written about the “battle.” They ask: Do persons who exchange forms with different pre-established standard terms have a contract when neither reads the other’s form but each performs as if there is a contract? And if there is a contract, what are its terms? They classify national and international solutions to these questions with descriptive tags—“no contract”; “first shot”; “last shot”; “knock out”; “hybrid”—used by aficionados who barely pause to elaborate.<sup>10</sup> These classifications and the concept of non-negotiated standard terms are so familiar I will not take up space to define them.

Something, however, should be said about the “battle of forms” and the CISG. As with other laws, there is a growing literature analyzing the problem.<sup>11</sup> Attempts at the 1980 Diplomatic Convention to address the issue with a specifically-tailored provision failed.<sup>12</sup> It is

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<sup>10</sup> See generally Kadner Graziano, *supra* note 7; see also Dannemann, *supra* note 9.

<sup>11</sup> A search in the bibliography of published commentaries maintained by the CISG Database maintained by Pace Law School yielded seventy-four entries with the word “battle” in the title. *Bibliography*, PACE LAW SCH. INST. OF INT’L COMMERCIAL LAW, <http://www.cisg.law.pace.edu/cisg/biblio/biblio.html> (last visited June 30, 2014).

<sup>12</sup> At the 1980 diplomatic conference, Belgium proposed to add a paragraph (4) to Article 19 (“(4) When the offeror and the offeree have expressly (or implicitly) referred in the course of negotiations to *general conditions* the terms of which are mutually exclusive the conflict clauses should be considered not to form an integral part of the contract.”). *Report of the First Committee*, U.N. Doc. A/CONF.97/11 (Apr. 7, 1980).

generally agreed that the solution must be found in Article 19 CISG, which, with slight modifications, requires the terms of an acceptance to be the same as those in the offer.<sup>13</sup> Two solutions—“knock out” and “last shot”—have found favor with both courts and commentators. There appears to be a trend among commentators to favor the knock-out solution;<sup>14</sup> it is more difficult to identify a trend in the decisions of judges and arbitrators.<sup>15</sup>

Despite the academic interest in the subject, most authors concede that it is far from clear that the “battle” is of much interest in practice. This is certainly true with respect to the CISG. During the last twenty-five years, only a relatively small number of reported CISG cases have wrestled with the issue of conflicting standard terms.<sup>16</sup> As for a “battle” between differing choice-of-law terms, the number of reported cases can be counted on the fingers of one hand.<sup>17</sup>

## B. CISG Policies

Before turning to analysis of the specific issue addressed, several basic policies embodied in the provisions in CISG Part I (Sphere of application and general provisions) should be noted.

Article 1(1) is the basic provision defining when the Convention is applicable:

CISG

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

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<sup>13</sup> CISG, *supra* note 5, at art. 19.

<sup>14</sup> See COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS Art. 19, ¶¶ 34-38 (Peter Schlechtriem & Ingeborg Schwenzer, eds., 2d ed. 2005).

<sup>15</sup> See *generally* UNCITRAL, Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, at 103-07 (2012).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

when the States are Contracting States; or

when the rules of private international law lead to the application of the law of a Contracting State.<sup>18</sup>

Subsequent articles qualify this statement by excluding, for example, particular sale transactions and particular issues. For the purpose of this paper, however, the most relevant qualification is Article 6, which allows a seller and buyer to agree to exclude application of the CISG when the Convention would otherwise be applicable. Article 6 provides in relevant part:

CISG

Article 6

The parties may exclude the application of this Convention . . . .<sup>19</sup>

It is the interplay between these CISG scope provisions and Article 6 of the Hague Principles that is at issue in this paper.

When considering this issue, three general provisions in CISG Part I are of particular importance. Two of these provisions direct the reader as to how to interpret or construe the Convention, while the third sets out rules on the interpretation of a party's acts or statements. Article 7(1) states:

CISG

Article 7

**(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.**<sup>20</sup>

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<sup>18</sup> CISG, *supra* note 5, at art. 1.

<sup>19</sup> *Id.* at art. 6.

<sup>20</sup> *Id.* at art. 7(1) (emphasis added).

Article 7(2) goes on to provide that:

(2) Questions concerning matters governed by this Convention which are not expressly settled by it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.<sup>21</sup>

As for the interpretation of a party's statements, sub-articles (1) and (2) of Article 8 state:

CISG

Article 8

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.<sup>22</sup>

Article 9 supplements this article by binding parties to usages of trade and their course of dealing with each other.<sup>23</sup>

## II. THE BASIC SETTING

The Commentary to Article 6 of the Hague Principles analyzes the following scenario (Scenario 4):

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<sup>21</sup> *Id.* at art. 7(2) (emphasis added).

<sup>22</sup> *Id.* at art. 8(1) and (2).

<sup>23</sup> *Id.* at art. 9.



Party A to a transborder sales contract designates in its standard terms the law of State X, which is a CISG Contracting State, as the law applicable to the contract. Party B designates in its standard terms the law of State Y, which is also a CISG Contracting State, but explicitly excludes the CISG. The general contract law of State Y follows the knock-out rule. The case is brought before a court in a CISG Contracting State.<sup>24</sup>

Paragraphs 6.25-6.27 of the Commentary apply Article 6 of the Principles to this scenario and conclude that the parties have not agreed on the designation of an applicable law and therefore have not excluded application of the CISG.<sup>25</sup>

The analysis in the Commentary is straightforward. The law designated by each party's choice-of-law term is examined to determine how that law would resolve a "battle of forms." If under one or both of these laws no term prevails, the parties are deemed not to have chosen the applicable law. Party A's designation of the law of State X leads—in accordance with the general consensus of courts and commentators—to application of the CISG rather than domestic contract law. Article 19, the relevant contract formation rule of the CISG, is then identified. The Commentary accurately notes that there is no consensus among courts and commentators on whether Article 19 is a "knock out" or "last shot" rule, and the Commentary does not try to resolve this issue of CISG interpretation. A separate analysis of Party B's choice-of-law term is then made, although made simpler because the scenario itself indicates that State Y's general contract law—which is applicable, because Party B's term expressly excludes the CISG—follows the knock-out rule. Because no term prevails under one (or possibly both, depending on interpretation of CISG Article 19) of the laws designated by the two forms, the alternative set out in paragraph 1 *b*) of Article 6 of the Hague Principles provides that there has been no choice of the applicable law.<sup>26</sup>

A basic assumption of the Commentary is that no part of the CISG is relevant when determining whether the parties have agreed to

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<sup>24</sup> Hague Principles, *supra* note 1, Commentary at ¶ 6.24.

<sup>25</sup> *Id.* at ¶¶ 6.24-6.27.

<sup>26</sup> *Id.*

exclude the Convention pursuant to Article 6 of the CISG: “[i]f the parties enter into a choice of law agreement excluding the CISG, the CISG will not apply”<sup>27</sup> and “[because under the doctrine of severability] the choice of law agreement is a separate contract that is distinguished from the main contract (*e.g.*, the sales contract) . . . the Principles govern the choice of law agreement, whereas the CISG governs the sales contract . . . .”<sup>28</sup>

The issue is therefore whether this assumption is correct. In a separately published analysis, Professor Kadner concedes that his position—which supports the solution in the Hague Principles—is contrary to the “currently dominant position.”<sup>29</sup> He cites five authors and one court decision as favoring the view that the contract formation provisions of the CISG (Part II: Arts. 14-24) apply to the formation of the choice-of-law agreement.<sup>30</sup> He rejects this position on the principal ground that a choice-of-law agreement is distinct (“severable”) from the contract of sale.<sup>31</sup> For this proposition, he relies on Article 7 of the Hague Principles, which states the severability principle,<sup>32</sup> and Article 4 of the CISG, which states that the Convention “governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract.”<sup>33</sup> In support of his interpretation, Professor Kadner suggests several useful consequences. He notes that looking to general contract law rather than Part II of the CISG has the advantage of providing more comprehensive contract formation rules.<sup>34</sup> He also points out that, because Article 4(a) of the CISG excludes coverage of issues of validity, a solution that leads to

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<sup>27</sup> *Id.* at ¶ 6.25.

<sup>28</sup> *Id.* at ¶ 6.26

<sup>29</sup> To be accurate, Professor Kadner addresses the issue in his analysis of paragraph (1)(b) of Article 1 of the CISG. That paragraph provides that the CISG governs a contract of sale if rules of private international law lead to the law of a Contracting State. Professor Kadner’s analysis of Article 1 is equally applicable to Article 6 of the CISG. Kadner, *supra* note 7, at 95-98.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Hague Principles, *supra* note 1, art. 7.

<sup>33</sup> CISG, *supra* note 5, art 4.

<sup>34</sup> Kadner, *supra* note 7, at 97.

general contract law provides a single law for issues of both formation and validity.<sup>35</sup>

Without necessarily endorsing the dominant position—at least as it is summarized by Professor Kadner—I find Professor Kadner’s reliance on Article 4 of the CISG unpersuasive. On its face, the CISG governs more than contract formation (Part II) and the rights and obligations of sellers and buyers (Part III). The CISG clearly also governs the Convention’s sphere of application, not to mention the Final Provisions in Part IV. There is little reason to think that the general provisions in Part I (Arts. 7-13) do not apply to interpretation of the sphere of application provisions (Arts. 1-6) as well as to the provisions of Parts II and III. Thus, if the policies and rules of interpretation found in Part I support the proposition that the CISG determines whether the parties have agreed to exclude the CISG, there is no need to rely on direct application of Article 19 of the CISG.

Moreover, I think Professor Kadner pays insufficient attention to the CISG policies and principles of interpretation noted above in this paper’s preliminary remarks. Although the CISG does not deny a role for private international law as its predecessor (Uniform Law on the International Sale of Goods (ULIS)) did,<sup>36</sup> the CISG subordinates the role of private international law to the Convention’s provisions and the general principles on which the CISG is based. The subordination of private international law is evident in the basic scope provision of Article 1(1) of the CISG: if the seller and buyer have their places of business in different Contracting States, the CISG applies;<sup>37</sup> only if that paragraph is not satisfied does private international law play a role in making the CISG apply. To argue that private international rules are the *exclusive* source of rules when determining whether the parties have agreed to exclude the CISG pursuant to Article 6 is to upset the agreed relation between the CISG and private international law. It should not be forgotten that until it is shown that the parties agreed to exclude the CISG pursuant to Article 6 of the CISG, the Convention governs. In

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<sup>35</sup> *Id.* at 96-97.

<sup>36</sup> Uniform Law of International Sales, art. 2. The Uniform Law is set out in the annex to the 1964 Convention Relating to a Uniform Law on the International Sale of Goods, 834 U.N.T.S. 107 (1972).

<sup>37</sup> CISG, *supra* note 5, art. 1(1)(a).

other words, Article 6 itself is in a sense subordinate to the scope provisions of Article 1(1).<sup>38</sup>

One reason for subordinating private international law is that the CISG endorses the policy of uniformity, and private international rules do not always lead to uniform outcomes. This is true in the context of contracts and is especially true when parties use standard terms, where the rules are uncertain in part because of the failure of commentators to analyze the issues. There is no assurance that the Hague Principles will be successful in securing uniformity by their formula for analyzing the battle of forms. Even if widely implemented, the Hague Principles allow for potential non-uniform outcomes. For example, the Principles rely on non-uniform rules of interpretation unlike the CISG, which, as noted earlier, incorporates uniform provisions on interpretation of the parties' statements and on the binding quality of the parties' course of dealing and usages of trade.

### III. MORE DETAILED ANALYSIS OF SCENARIO 4

In the scenario set out in the Hague Commentary, the judge sits in a State party to the CISG.<sup>39</sup> The judge is bound by Article 1(1)(a) to apply the CISG unless it can be shown that Party A and Party B agreed to exclude the Convention pursuant to Article 6. How the judge might analyze the issues involved may best be understood by considering several simpler hypothetical cases.

If Party A and Party B had negotiated a term that expressly excluded the CISG but did not designate the applicable law, the issue whether the parties agreed to the term is a matter of interpreting Article 6 of the CISG. The CISG does not provide an explicit answer, so, before turning to private international law, Article 7(2) directs the reader to look to the general principles on which the CISG is based. These principles can be derived from Part II and can be summarized

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<sup>38</sup> For an analysis of the relation of Article 6 of the CISG and private international law, see COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS, *supra* note 14, Art. 6, ¶¶ 4-5 ("The formation and interpretation of the exclusion of the CISG is subject to the rules of the Convention as the CISG determines its sphere of application autonomously").

<sup>39</sup> Hague Principles, *supra* note 1, Commentary at ¶ 6.24.

as requiring clear evidence of actual agreement. Article 19 would not be directly applicable, but indirectly the insistence on a “mirror-image” acceptance of an offer is evidence of this principle. If a court should find that there was an agreement to exclude the CISG, the court would then apply private international law rules to determine which State’s law applies when the parties have not chosen the applicable law.

This analysis becomes only slightly more complicated if Party A and Party B each includes in its standard terms a term excluding the CISG without designating another law as the law applicable. The complication arises because each of the exclusion terms must be read in the light of Article 8 of the CISG (and, when relevant, Article 9 on binding trade usages and the parties’ course of dealing). If each exclusion term is unambiguous there would be consensus on exclusion and again a judge would apply the national law applicable by virtue of the rules of private international law. If, however, one of the terms is interpreted as not excluding the CISG, the judge would look to the general principles on which the CISG is based as directed by Article 7(2). This general principle, I suggest, is to enforce the agreement of the parties when interpretation of their statements and acts under Article 8 show that there is consensus. The general principle is derived from Part II of the CISG and is not bound by any particular interpretation of Article 19. In a case where one standard term excludes the CISG and the other does not, a court should find that the seller and buyer have not agreed to exclude the CISG.

Sellers and buyers will rarely agree to exclude the CISG without designating the law applicable instead. Somewhat more likely is a transaction where Party A and Party B negotiate a term excluding the CISG and a separate term that designates the law of State Z, a non-CISG State, as the applicable law. The judge in this case must answer two questions: Did the parties agree to exclude the CISG? and, Did the parties effectively choose the law of State Z? As in the cases analyzed in the preceding two paragraphs, the judge should analyze the first of these questions in light of the CISG’s general principles on the formation of an enforceable agreement. That the parties purport to choose the law of State Z as the applicable law is some evidence of their intent to exclude the CISG. Whether or not their choice of State Z’s law is valid is a separate question. If the judge concludes that the parties agreed to exclude the CISG, the judge must then determine

whether rules of private international law would give effect to the parties' choice of the law of State Z.

These same two questions are posed even if Party A and Party B include the exclusion and the choice of the law of State Z in a single term of their agreement—or in substantively-equivalent terms in each of their standard terms. There is no reason for the judge to analyze the case differently. Even if the parties use a more likely formula—the term merely designates the law of State Z as the applicable law—there are the same two questions and the same analysis. Note, in particular, that absent an express exclusion of the CISG the choice of the law of State Z might be intended merely to designate the applicable domestic law if there are gaps in the CISG.<sup>40</sup>

Scenario 4 of the Hague Commentary also involves the same two questions and the same analysis. One standard term designates the law of State X, which effectively is a choice of the CISG; the other standard term designates the law of State Y but expressly excludes application of the CISG, which effectively is a choice of the domestic law of State Y. Applying the CISG's general principles on contract formation to the first question, there is no consensus on exclusion of the CISG under Article 6 of the CISG. Nor, as it happens, is there an effective choice of the applicable law by application of the analysis found in the Commentary to Article 6 of the Hague Principles. The analysis of the two questions is simpler and more direct than that based solely on Article 6 of the Principles. It recognizes a role, albeit a subordinate one, for private international law. In other words, the analysis is a rational alternative to the reasoning of the Hague Principles.

#### IV. ADDITIONAL REMARKS

Whether one analyzes Scenario 4 using the Hague Commentary or my alternative analysis the result is the same: Party A and Party B have not agreed to exclude application of the CISG so the Convention governs their transaction. Nevertheless, several additional remarks are in order.

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<sup>40</sup> CISG, *supra* note 5, art. 7(2).

First, the Commentary apparently assumes that there is at all times an enforceable sales contract. This is apparently based on the concept of severability: whether or not the parties have a contract of sale excludes any consideration of choice-of-law terms even if all the terms are in a single document. It is difficult to imagine that sellers and buyers think of their “deal” as consisting of two distinct contracts. My alternate analysis leaves open the question of whether the parties have formed a contract of sale. If the parties have not agreed to exclude the CISG, a judge will determine whether the parties concluded a sales contract by looking to Article 19 and applying it to *all* terms (including the choice-of-law term) of the parties’ deal.

Second, the Commentary makes the result appear easy by simply stating State Y’s contract law rule on battle of forms without going through the potentially difficult task of ascertaining and interpreting that rule.<sup>41</sup> Having reported that the rule is a “knock-out rule” the result follows by a simple application of paragraph 1 *b*) of Article 6 of the Hague Principles: “if the parties have used standard terms designating two different laws and . . . [if] under one or both of these laws no standard terms prevail, there is no choice of law.”<sup>42</sup> Under the “knock-out rule” of State Y, no standard term prevails so there is no choice of law. In practice, however, identifying how a jurisdiction deals with conflicting standard terms may be contentious and time-consuming—and in the case of conflicting standard choice-of-law terms the analysis will have to be done for each of the jurisdictions designated in the conflicting standard terms.<sup>43</sup>

Third, it follows from the second point that, if Article 19 of the CISG is interpreted as adopting a “knock-out rule,”<sup>44</sup> parties will never chose the applicable law if one of the parties designates the law

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<sup>41</sup> Hague Principles, *supra* note 1, Commentary ¶ 6.24.

<sup>42</sup> *Id.* at art. 6 1 *b*).

<sup>43</sup> If the CISG is interpreted as adopting a knock-out rule, there never will be a choice of law when one of the States is a CISG state. The answer to scenarios like that of Scenario 4 will always be that there is no choice of law. The Hague Commentary avoids interpretation of Article 19 because the scenario itself states that the law of State Y regarding battle of forms applies a knock-out rule.

<sup>44</sup> It should be noted that the Hague Commentary quite rightly does not interpret Article 19, merely calling attention to the several possible interpretations recognized in case law and the literature.

of a CISG state as the applicable law. The answer to scenarios like that of Scenario 4 will always then be that there is no choice of law agreement. This would simplify analysis using the Commentary's approach because no further analysis is necessary if one party has designated a CISG state.

Finally, by commenting on the interface between the Principles and the CISG only with respect to the "battle of forms," the Commentary misses an opportunity to provide a more systematic analysis of that interface. If, for example, the parties are not located in different Contracting States, what is the relation of the Hague Principles to CISG Article 1(1)(b)? Even within Article 6 of the Principles there are questions that might have been addressed. Consider the following variation on Scenario 4:

Party A's standard terms designate the law of State Z, a non-CISG State, and Party B's standard terms neither exclude the CISG nor choose an applicable law. (All other facts remain the same as in Scenario 4.)

Paragraph 1 *b*) of Article 6 is not relevant—the parties' standard terms have not chosen two different laws—so paragraph 1 *a*) is the relevant rule. As a similar provision in Article 10 of the Rome I Regulation is interpreted, the law of State Z is the law the two parties "purportedly agreed to."<sup>45</sup> In such a case, Professor Kadner argues that the domestic contract law of State Z determines whether the choice is valid.<sup>46</sup> If it is valid, the Principles would conclude that, because the CISG is not the law in State Z, the parties had excluded the CISG even though Party A and Party B have their places of business in different Contracting States. By contrast, an analysis that applies the CISG principles to determine whether the parties have agreed to exclude the CISG would look to the statements and acts of both parties rather than a "purported agreement" derived from only one of them. The silence of Party B should not be deemed an acceptance of Party A's term. This is a general principle found in Article 18(1) of the CISG ("Silence . . . does not in itself amount to acceptance").<sup>47</sup> Moreover, given the

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<sup>45</sup> Council Regulation 593/2008, The Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6.

<sup>46</sup> Kadner, *supra* note 7, at 94-99.

<sup>47</sup> CISG, *supra* note 5, art. 18(1).



widespread adoption of the CISG, Party B's silence may reflect a judgment that there is no need to choose a law when dealing with businesses located in other Contracting States because the CISG will apply and Party B thinks its provisions satisfactory. This analysis leads to the conclusion that Party A and Party B have not agreed to exclude the CISG.

The Commentary's relatively straightforward analysis of Scenario 4 may leave the impression that all applications of the Hague Principles will be equally straightforward. This is not the case. The Commentary rightly points to the potential importance of applying the Principles to CISG transactions. It is unfortunate—but understandable for reasons of space—that the Commentary addresses only one scenario. For informed analysis of additional scenarios, the reader must look to Professor Kadner's separate publication.<sup>48</sup>

### CONCLUSION

In this paper I analyze the relation of the Hague Principles on the Choice of Law in International Commercial Contracts to the CISG when a seller and a buyer exchange different choice-of-law terms in their standard terms. I have done so by studying a scenario ("Scenario 4") in the Commentary to Article 6 of the Principles. The thesis of the paper is that the solution offered in the Commentary is not the only reasonable way to analyze the scenario. In support of my thesis it is not necessary that I demonstrate that my analysis is the only proper analysis or even that my analysis is the better one. I merely have to show that a rational judge or arbitrator might choose my analysis over that offered by the Commentary. If I am persuasive, adoption of the Principles should not be read as endorsing the Commentary solution as definitive.<sup>49</sup>

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<sup>48</sup> Kadner, *supra* note 7, at 94-99.

<sup>49</sup> The final text of the Commentary adds a final sentence to paragraph 6.23: "The interpretations of the CISG in this Commentary do not purport to be exclusive or authoritative interpretations of the CISG by the Hague Conference or its members." *See supra*, note 1.